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In the

Supreme Court of the United States

October Term, 1963
No. 566

IN THE MATTER OF THE ESTATE OF
ANTON BELEMECICH, DECEASED

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PRAYER

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Commonwealth of Pennsylvania, respectfully prays that the Petition for a Writ of Certiorari filed in the above entitled case be denied.

QUESTION PRESENTED

Does the Treaty of 1881 between the United States and Serbia preclude the Orphans' Court of Delaware County from making distribution of an estate of a Pennsylvania decedent in such manner and amounts so as to insure that the heirs actually do receive their inheritance?

STATUTE INVOLVED

The Act of 1953, July 28, P. L. 674, §§2, 3, 4, 20 P.S. §§1156, 1157, 1158 (Pocket Parts), provides as follows:

"§1156. Decree of partial distribution or of payment without escheat.

"Whenever it shall appear to the court that if distribution were made a beneficiary would not have the actual benefit, use, enjoyment or control of the money or other property distributed to him by a fiduciary, the court shall have the power and authority to direct the fiduciary (a) to make payment of the share of such beneficiary at such times and in such manner and amounts as the court may deem proper, or (b) to withhold distribution of the share of such beneficiary, convert it to cash, and pay it through the Department of Revenue into the State Treasury without escheat."

"§1157. Custody of funds in commonwealth; fiduciary released

"Upon receipt of the money directed to be paid into the State Treasury, the Commonwealth shall assume the custody of such money for the benefit of such beneficiary. The fiduciary, by making such payment, shall thereafter be relieved of and released from any and all liability for any claim or claims which then exist or thereafter arise with respect to such money."

"§1158. Repayment

"*Any beneficiary or person, legally entitled to any money which has been paid into the State Treasury under the provisions of this act, may at any time petition the court which directed such payment into the State Treasury for repayment of the same.* Upon proof to the satisfaction of the court of the petitioner's ownership of such money and that he will have the actual possession, benefit, use, enjoyment or control, thereof the court shall enter a decree directing the Board of Finance and Revenue to *make an order for repayment, payable out of funds in the State Treasury appropriated for that purpose, with interest thereon at the rate of two percentum per annum* from the date when the said money was paid into the State Treasury to the date of repayment thereof." (Emphasis supplied.)

STATEMENT OF THE CASE

Anton Belemecich died October 13, 1958 intestate, survived by neither spouse nor issue and apparently survived by neither parent. Decedent was a resident of Delaware County, Pennsylvania at the date of death and his estate was administered in the Orphans' Court of Delaware County at No. 146 of 1960 before the Honorable Edward Leroy van Roden, President Judge.

Four hearings were conducted at which oral testimony was taken and documentary evidence submitted. After hearing the testimony, the court determined the heirs at law of the decedent to be Ana Belemecich, a sister, Mato Belemecich, a nephew, Marija Belemecich, Ana Belemecich, Kljunak and Pija Belemecich, nieces. The heirs are residents of Yugoslavia.

The auditing judge by decree of May 14, 1962 ordered the funds in the hands of the fiduciary to be paid to the Department of Revenue of the Commonwealth of Pennsylvania as custodian for payment to the State Treasury of the Commonwealth of Pennsylvania without escheat, in compliance with the Act of July 28, 1953, P. L. 674, section 2, 20 P.S. 1156.

Exceptions were filed by the Consul General of Yugoslavia as attorney-in-fact for the heirs at law. Thereafter, the Orphans' Court of Delaware County filed an Order Amending and Modifying the Adjudication. The amendment of the court below directed the fiduciary to pay the balance of all monies on hand to

the Clerk of the Orphans' Court of Delaware County to hold the same until further order of court. The Orphans' Court further ordered and decreed that the clerk pay to the named heirs-at-law the sum of $500 each through R. Paul Lessy, Esquire, attorney for the attorney-in-fact, who was charged with the responsibility of securing receipts from the heirs which would reflect the exact amounts actually received by the distributees.

Contrary to the assertions of the petitioner, the Orphans' Court was well aware of the opinion in *Kolovrat et al. v. Oregon*. That court obviously considered the case inapplicable to the present matter for reasons hereinafter set forth in our argument.

The Consul General of the Republic of Yugoslavia appealed the Adjudication and the Amendment thereto to the Supreme Court of Pennsylvania which Court affirmed the court below. The Consul General of Yugoslavia then filed a Petition for Reargument with the Supreme Court of Pennsylvania which petition was denied per curiam. Thence, the Consul General of Yugoslavia filed his Petition for Writ of Certiorari with your Honorable Court.

ARGUMENT

A. The Power To Control the Administration of Decedents' Estates and the Distribution of Estates Is Reserved to the States

The power to control the administration of estates of decedents is reserved to the states and has not been granted to the federal government. U.S.C.A. Const. Amend. 10.; *Wachovia Bank and Trust Co. v. Green*, 73 S.E. 2d 879, 236 N.C. 654.

It is well-recognized that every state possesses the power of regulating the manner and terms upon which realty or personalty within its dominion may be transmitted by last will and testament. The right to succeed to property is created by law and the transferee derives his right to take property of the decedent *under the laws of the state* and the state by statute may make the right subject to burdens imposed. *Plummer v. Coler*, 178 U.S. 115, 44 L. Ed. 998, 20 S. Ct. 829.

In the *Plummer* case the court held that the right to take property by devise or descent is the creature of the law and not a natural right or privilege and, therefore, the authority which confers it may impose conditions upon it.

The court in the *Plummer* case, quoting from the opinion delivered by Chief Justice Taney in *Mager v. Grima*, 8 How. 490, held at 178 U.S. 126:

> "'Now the law in question is nothing more than an exercise of the power which every State

and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take, either real or personal property, situated within its limits either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. . . .'"

In the case of *In Re Braier's Estate*, 111 N.E. 2d 424, 305 N.Y. 148, appeal dismissed *Kalmane v. Green*, 346 U.S. 802, 98 L. Ed. 334, 74 S. Ct. 32, the court held that the provision in the Surrogate's Court Act requiring that money to a legatee would be paid to the Surrogate's Court where the conditions are such that a legatee would not have the benefit of payment relates to matters of descent and devolution and treats a matter beyond the scope of The Trading with the Enemy Act and hence is not unconstitutional as invading a legislative area pre-empted by the federal government.

The state's statute was held to be constitutionally valid since it was not diametrically opposed to federal law.

A case closely analogous to the instant case was before your Honorable Court very recently in *Ioannou v. New York*, 371 U.S. 30 (1962). That case dealt with a claim by an assignee who lived in London to estate funds which had been deposited with the Treasurer of the State of New York for the benefit of an assignor (who lived in Czechoslovakia) under a New York statute which provided for such deposit when it appeared that it was improbable that the distributee would have the benefit, use and enjoyment of the legacy. *In that case your Honorable Court dismissed the appeal for want of a substantial federal question.*

Historically the regulation and administration of decedents' estates has been within the jurisdiction of the individual states of the Union. The instant case is entirely a question of the administration and distribution of an estate of a Pennsylvania decedent and therefore should be controlled by Pennsylvania law. There is no direct conflict between the instant case and the federal law as we shall disclose in the succeeding portion of this brief.

B. Kolovrat et al. v. Oregon, Distinguished

It is most important to note that Judge van Roden of the Orphans' Court of Delaware County did order the sum of five hundred dollars ($500) to be paid to each of the five beneficiaries residing in Yugoslavia which award was affirmed by the Pennsylvania Supreme Court.

The size of the estate exceeds seventy thousand dollars ($70,000) and the Orphans' Court was rightfully concerned that the distributees actually receive their inheritance. This is manifested in the Court's Order Amending and Modifying Adjudication wherein said payments were ordered to be made to the attorney for the Consul General of Yugoslavia who is charged with the responsibility of securing receipts in writing, itemizing expenses, charges, and deductions—and reflecting the exact amounts actually received by the distributees. Such receipts were to be submitted to the court for inspection.

It is patently evident that the court was *not depriving* the heirs of their inheritance; on the contrary, the court's ultimate concern was to *insure the receipt* of the funds by the beneficiaries *free from confiscation or appropriation by any party.* Such is the inherent responsibility of the Orphans' Court whether the beneficiary be resident, nonresident or alien. Judge van Roden realized the duty imposed upon him and the responsibility to see that the heirs did receive and enjoy their legacies. This responsibility is reflected in the words of President Judge Jones of the Orphans' Court of Luzerne County, now Mr. Justice Jones of the Pennsylvania Supreme Court in *Estate of Frank Wozniak*, 44 Luz. Leg. Reg. 227 (1954), wherein he stated:

> *"We conceive it to be our duty to exercise the highest degree of care and caution to assure that funds of a deceased American national be transmitted to his heir in a foreign country in such manner that the heir not only physically receive*

> ***the funds but be free to enjoy, use and control the funds. . .***" (Emphasis supplied.)

The Pennsylvania statute clearly prescribes that any beneficiary or person legally entitled to any money may *at any time petition the court for same.* The Pennsylvania courts will and have ordered payment where sufficient proof was adduced that the beneficiary will have the actual possession, benefit, use and enjoyment of the funds. *Aras Estate*, 16 D. & C. 2d 635 (1959), *Estate of John Piscak*, 108 P.L.J. 309 (1960).

Here we have a sizable estate. Before the court will transmit the *entire estate*, it is proceeding with due caution by requiring acknowledgment of the receipt of a portion of the estate. Clearly the court's action is for the benefit of the heirs and not to their detriment as petitioner would have us believe.

Appellant relies almost exclusively on *Kolovrat et al. v. Oregon*, 366 U.S. 187 (1961).

The court's opinion in the *Kolovrat* case was predicated upon the fact that the Oregon court determined that reciprocity did not exist between Oregon residents and Yugoslavian nationals (though the Treaty between the United States and Serbia deemed such reciprocity did exist), and the Oregon court determined that Yugoslavian fluctuation of monetary exchange deprived Oregon citizens of reciprocal rights (though the Bretton Woods Agreement of 1944, 16 Stat. 1401 precludes any state from deciding that Yugoslavian laws do not meet the standards of international agreements concerning world monetary con-

trols). These factors are nonexistent in the instant case.

Preliminarily it is important to note that in 1881 the United States and Serbia concluded a treaty which is in full force and effect between the United States and Yugoslavia. This treaty provides in part that there *shall be reciprocal rights of inheritance* between the citizens of the two high contracting powers.

The Oregon statute provided for reciprocity in determining the right of an alien to take either real estate or personal property by succession or testamentary disposition in the estate of an Oregon decedent. Under the statute an alien heir must establish, as a prerequisite to his rights, that Oregon residents have reciprocal rights in estates of Yugoslavian decedents. If such alien claimant fails to establish proof of reciprocal rights *he is divested of his legacy or inheritance.*

By its very nature, the Oregon statute required the court to determine the existence or nonexistence of reciprocity between citizens of Oregon and citizens of Yugoslavia. Oregon was precluded from determining that reciprocity did not exist since the Treaty of 1881 *deemed* that there was reciprocity between the two nations.

Nevertheless, the Supreme Court of Oregon erroneously found that reciprocity did not exist. That court also erred in interpreting the treaty to apply only to the right of a United States citizen to acquire or inherit property in Yugoslavia only if he is "in Yugoslavia" and to a Yugoslavian citizen to acquire or in-

herit property in the United States only if he is "in the United States."

Under the Oregon statute the State did not take the funds in a custodial capacity for the protection of the heirs but rather confiscated the funds to and for its own use.

We concede that the Treaty of 1881 deems that reciprocity between the two nations regarding rights of inheritance does exist and that a state court is precluded from finding otherwise.

We also concede that the confiscation of these funds by the State of Oregon or any other state is violative of the above treaty.

The controlling distinction is that in the instant case the determination in no way involved the question of reciprocal rights of Pennsylvania residents. Furthermore, and perhaps more important, the Commonwealth's statute is not confiscatory, but on the contrary, is geared to prevent confiscation and to protect the rights of a beneficiary. It imposes the duty on the court to see to it that the beneficiary *does* receive his legacy. This is clearly within the jurisdiction of the Orphans' Court of a state. The courts are duty-bound not only by statute but by inherent power to guard the interests of the heir or beneficiary.

The statutes of this nature in most of the western states are confiscatory, while those of the eastern states are custodial and protective. This distinction is thoroughly discussed in an excellent Law Review article entitled "Distributive Rights of Foreign Beneficiaries as Affected by State Action—Recent Penn-

sylvania Developments," Snyder and Stander, 63 Dickinson Law Review, 1958-59.

On the one hand, the western statutes, including that of Oregon, are substantive in nature. By that we mean that the state takes title to the property, thereby being confiscatory and precluding a foreign heir from any rights he may have to an inheritance.

The eastern states, including Pennsylvania, are procedural in nature and simply provide for delayed distribution and temporary custody pending proof that an heir will have the use, benefit and enjoyment of his legacy. The Pennsylvania statute does not require reciprocity and it does not violate the provisions of the treaty. Furthermore, the Pennsylvania statute is not confiscatory but rather custodial. Nor do we entangle ourselves in the mesh of monetary controls in view of the Bretton Woods Agreement.

This distinction is recognized by the Solicitor General of the United States who was amicus curiae in the *Kolovrat* case. The annotation to the *Kolovrat* case at 6 L. Ed. 2d 1344 dealing with the briefs and appearances of counsel states as one of the Solicitor General's positions:

> "Section 111.070(1)(b) of the Oregon Probate Code, at least in so far as it *precludes* inheritance by an alien whenever any monetary controls exist, has been overridden and superseded by the Bretton Woods Agreement and the overriding federal policy declared thereby." (Emphasis supplied.)

The Commonwealth in no respect is precluding the rights of these heirs, but on the contrary is protecting their inheritance for them.

An analogous situation can be seen in two United States Supreme Court cases, to wit, *First National Bank of San Jose v. State of California*, 262 U.S. 366, 43 S. Ct. Rep. 602 (1923), and *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. Rep. 599 (1944).

The *First National Bank* case dealt with an escheat law of the State of California. The California statute provided that after a prescribed period of dormancy, certain accounts in banks, including national banks, would escheat to the state and the state would thereby have title to the monies. The statute was confiscatory. The national bank asserted that the law was invalid as to them since these banks are instrumentalities of the federal government and such a statute conflicts with the laws of the United States.

The bank asserted that it frustrates the purposes of the national legislation and impairs the efficiency of the bank to discharge its duties. The Supreme Court upheld the contention of the national bank stating:

> "This court has often pointed out the necessity for protecting federal agencies against interference by the state."

In the *Anderson* case a similar statute of the State of Kentucky was involved. However one distinction existed. The Kentucky statute called for the *custody* by the state of such dormant accounts with the right of the rightful owner to thereafter assert his claim.

It was not confiscatory as was the California statute but rather custodial and protective.

The Supreme Court upheld the right of Kentucky to the custody of these funds holding:

> " . . and it is within the constitutional power of the state to protect the interests of depositors . . . by taking them into custody . . ."

The court further held:

> ". . . In all this we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks."

The distinction found to be controlling in the above cases is equally applicable in the present matter.

Clearly then a state may not by substantive legislation confiscate funds and thereby deprive rightful owners of their monies. It is just as clear that a state through procedural legislation may take custody of funds and protect those funds for and on behalf of the rightful owners.

The treaty between the United States and Serbia is *not* diametrically opposed to the action taken by the Orphans' Court of Delaware County. On the contrary, the action of the Orphans' Court directs distribution of a portion of the funds and the Orphans' Court is proceeding to distribute the subject funds to the rightful owners.

As stated in *Zupko Estate*, 15 D. & C. 2d 442, 447 (1958):

> ". . . The treaty did not purport to create special rights of succession in favor of aliens . . ."

The Orphans' Court in its inherent power to guard the legacies of heirs or beneficiaries would no doubt take similar action in the case of a resident beneficiary who for some reason would be temporarily incapacitated or unable to have his legacy free from possible confiscation by others.

The power, the duty, and the obligation of the Orphans' Court to protect the interest of the beneficiaries from confiscation by others and the recognition that the property is held in a temporary and custodial capacity is clearly pronounced in *Dopierala Estate*, 7 Fiduc. Rep. 262 (1957), *Demczuck Estate*, 8 D. & C. 2d 462 (1956), *Aras Estate*, 16 D. & C. 2d 635 (1959) and *Stede's Estate*, 38 D. & C. 209 (1939).

As held in *Zaranco Estate*, 74 D. & C. 462 (1950), and *Zielinski Estate*, 73 D. & C. 81 (1950), relying on *Rocca v. Thompson*, 233 U.S. 317 (1912):

> "A careful study of the treaty under consideration has failed to disclose any pertinent provision which inhibits this court in its recognized obligation to protect the rights of a local decedent's heirs, regardless of their citizenship or residence. In Rocca v. Thompson, 233 U.S. 317 (1912), it was held that a *privilege conferred by the 'most favored nation' clause of a treaty with a foreign nation cannot be construed as intended to supersede the local law as to the administration of estates.*" (Emphasis supplied.)

The Pennsylvania statute is procedural and custodial. It is not substantive and confiscatory. The statute does not preclude an alien from an inheritance; it protects the inheritance for the heir.

This is clearly a question of administration of estates and local law controls. The action of the Orphans' Court was within its powers and jurisdiction and did not violate the treaty.

CONCLUSION

In conclusion, neither the Orphans' Court nor the Commonwealth wishes to confiscate the funds nor to deprive the rightful owners of their legacies. On the contrary, as stated by President Judge Roberts, now Mr. Justice Roberts of the Pennsylvania Supreme Court, in *Dopierala Estate*, 7 Fiduc. Rep. 262 (1957):

> "We seek to protect the beneficiary's inheritance against confiscation or domination by the government of her residence, and to afford her as much enjoyment of her property as present circumstances permit. . . *This temporary protective action is exclusively for the benefit of the beneficiary, and distribution will be made directly to her, just as soon as the court is satisfied that she will enjoy the actual benefit, use and control of the funds awarded to her.*" (Emphasis supplied.)

The treaty is not violated and the Yugoslavian heirs are not precluded from their inheritance nor divested of any rights.

The Orphans' Court decreed a partial distribution to the heirs and wants proof that they have received the funds. Certainly this is not only most reasonable

but would appear to be mandated by the responsibility of the Court to see that *any* heir, whether resident or alien, receives his inheritance.

Respondent submits that the action of the Orphans' Court and the decision of the Pennsylvania Supreme Court is correct, proper, and consonant with federal as well as local law. We further submit that the case presents no substantial federal question and therefore pray your Honorable Court to deny the Petition.

Respectfully submitted,

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